87-599

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MASTERS, MATES AND PILOTS PENSION PLAN,
Petitioner,

v.

WILLIAM F. DEAK, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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STATEMENT OF QUESTIONS PRESENTED

1. Whether a pension plan regulation, embodying the substantive provisions of the collective bargaining agreement establishing the trust, and which does not violate any structural provision of ERISA, is subject to review by the federal courts for reasonableness, pursuant to Section 302(c)(5) of the Labor Management Relations Act of 1947, 29 U.S.C. § 186(c)(5) or Section 404 of ERISA, 29 U.S.C. § 1104.

2. Whether pension plan trustees, in adopting a plan amendment clearly and positively required by the collective bargaining agreement, are required to consider whether the parties to collective bargaining are acting in their own interest, or "solely in the interest of beneficiaries and participants" of the pension plan.

PARTIES TO THE PROCEEDINGS

Petitioner is the MM&P PENSION PLAN. Respondents are WILLIAM F. DEAK, ROBERT L. FONDA, and DANIEL O. SPENCE as named Plaintiffs and representatives of a class of participants in the MM&P PENSION PLAN. The class consisted of some 2,000 participants in the Plan whose names were provided to the trial court for sending out class action notices, and whose identity was sealed by Order of the District Court. The trial court denied relief to two of the three subclasses, of which the named Plaintiffs were not members. The subclass granted relief, of which the named Plaintiffs are members, consisted of less than 10 individuals.

Additionally, as Defendants below, but dismissed after trial by the District Court, were individuals:

> Stephen E. Maher, Nicholas Telesmanic, William I. Ristine, Franklin K. Riley, Jr., Michael DiPrisco, Martin F. Hickey, James R. Hammer, James J. Hayes, Michael E. Swayne, Robert J. Lowen, Lloyd Martin, Orion A. Larson, Henry L. Nereaux, Richard M. Casselberry, George Groh, Francis E. Kyser, Rupert Soriano, and Allen C. Scott, individually and as trustees of the MM&P PENSION PLAN.

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IN THE

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No.

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CITATION OF OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit has been reported at 821 F.2d 572 (11th Cir. 1987) and is included within the Appendix to this Petition, commencing at p. 1a. The Memorandum Opinion of the District Court, Honorable W. Terrell Hodges, setting out the basis for its decision, has not been generally reported, but appears in the Appendix commencing at p. 18a. The Final Decree, granting injunctive relief as set out in the Memorandum Opinion, appears in the Appendix commencing at p. 36a. The Order, on Plaintiffs' Motion to Alter or Amend the Judgment, clarifying the relief granted, appears in the Appendix commencing at p. 38a.

JURISDICTION

The Judgment of the Court of Appeals was entered on July 15, 1987. App. 17a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Section 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5); Section 3(2), (19) and (24) of ERISA, 29 U.S.C. § 1002; Section 203(a)(3) of ERISA, 29 U.S.C. § 1053; Section 404 of ERISA, 29 U.S.C. § 1104, and Section 408 of ERISA, 29 U.S.C. § 1108. These statutory provisions are set forth in the Appendix, commencing at p. 42a.

STATEMENT OF THE CASE

Statement of Facts

This action was commenced by individual participants of the MM&P PENSION PLAN on behalf of themselves and a class of participants, under the provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq. (ERISA), to enjoin enforcement of Plan regulations which they contended unlawfully deprived them of pension benefits, and to recover damages. The district court found that the Plan provisions in question were lawful, but enjoined the application and enforcement of one of the Plan amendments based on the district court's conclusion as to the "purpose" of trustee adoption of the amendment. The facts giving rise to this controversy, as found by the lower courts, are as follows.

The MM&P PENSION PLAN was established in 1950 by the International Organization of Masters, Mates and Pilots, in connection with collective bargaining agreements in the maritime industry with various employers covering licensed deck officers. It is a multi-employer pension plan, created and maintained under Section 302(c)(5) of the Labor Management Relations Act of 1947, 29 U.S.C. § 186(c)(5).

Prior to 1976, the Plan provided four types of pensions. The type of pension involved in this litigation was based on years of service, and was available to participants who had at least 20 years of service, regardless of age. Prior to 1976, the Plan provided that a participant who was receiving pension benefits and returned to employment in the maritime industry (with certain exceptions not relevant) would have his pension benefits suspended during such employment and for an additional period of six months.

On December 29, 1975, the trustees of the MM&P PENSION PLAN adopted Amendment No. 42, which specifically defined "normal retirement age". It did not change the provisions for suspension of benefits upon re-employment ("Retirement Defined"), which continued to provide that the period of suspension would last for the period of employment, and for an additional six months. Both the trial court and the Court of Appeals found that amendment to be proper and lawful.

In 1976, the trustees adopted Amendment 46, which amended "Retirement Defined", to provide that if a participant returned to employment in the maritime industry as a licensed deck officer on a U.S. flag vessel with an employer who was not contributing[1] to the Plan, benefits would be suspended beyond the period of such employment to "normal retirement age". In practical effect, the change affected only pensioners who returned to employment with a non-contributing employer and then re-retired before reaching age 64½.

In 1977 and 1978, the named Plaintiffs applied for service pensions. Although each was less than 65 years of age (normal retirement age), each had more than 20

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[1] A contributing, or "covered", employer was one covered by the collective bargaining agreement, and required to contribute to the Plan. A non-contributing employer did not support the Plan in any way.

years of credited service, and each was granted a service pension. After they began receiving pension benefits, each again became employed in the maritime industry as a master of a U.S. flag vessel. Upon learning of such employment, which was in violation of the rules of the Plan, the trustees suspended Plaintiffs' pension benefits.

The collective bargaining agreement in effect at the time Amendment 46 was adopted required that

> "Pensioners will be prohibited from working at any job in the maritime industry after a pension is awarded". Sec. XXIX, C. Par. 8.

The Court of Appeals found that requirement was "clear and positive". (App. p. 7a). Pensioners were effectively precluded by the collective bargaining agreement from returning to employment with contributing employers. Non-contributing employers were not subject to the collective bargaining agreement or any restriction in the Plan against hiring pensioners. As a result, it was only non-contributing employers with whom pensioners might seek to return to employment.[2]

In carrying out the obligations of the collective bargaining agreement, by discouraging pensioners from returning to employment in the maritime industry, the trustees adopted Amendment 46. That amendment, in pertinent part, provides:

> ". . . if such employment is in the capacity of a Licensed Deck Officer on a U.S. flag ocean going vessel employed by a company which is not a participant in the M.M.&P. Pension Plan or the MM&P/PMA Pension Plan (other than employment as a civilian employee of the Military Sealift Command or other governmental entity), then the Pensioner

[2] In effect, what appeared to discriminate between covered and non-covered employment did not actually do so. Although this point was briefed and argued extensively, the Court of Appeals made no mention of it.

> shall not be entitled to pension benefits for any month of such employment nor for any months prior to such Pensioner reaching his Normal Retirement Age. . ."

The amendment was initially drafted by co-counsel designated by the union trustees. Prior to its adoption, the trustees relied upon their knowledge, expertise and experience in the maritime industry, and did not require or obtain any specific actuarial studies, or other independent determination of the financial need or impact of the proposed amendment.

This action was initially brought by Plaintiffs to challenge Amendment 42, contending that the adoption of a definition of normal retirement age was unlawful, and that their pension benefits could not be suspended for the period of employment, or for any time thereafter. The trial court rejected that argument on several occasions. Plaintiffs subsequently argued that Amendment 46 unlawfully discriminated between a return to covered as distinguished from noncovered employment, and that such was a violation of ERISA. 29 U.S.C. § 1053.

The trial court specifically found that Amendment 46 was not *per se* unlawful, in that it provided for suspension of retirement benefits prior to "normal retirement age", did not affect vesting or reduce the amount of the benefit, and therefore did not violate the "nonforfeitability" requirements of ERISA. The District Court found, however, that under the circumstances of this case, the adoption of an otherwise lawful amendment was a breach of the trustees' fiduciary duty because the court concluded that the amendment was adopted primarily to protect the union. The trial court thus enjoined enforcement of Amendment 46 to the extent that it distinguished between covered and noncovered employment in establishing the period of suspension of benefits for return to employment. The court

permitted the Plan to continue to suspend benefits during any period of employment and for six months thereafter, not to exceed normal retirement age as defined in the Plan.

THE COURT OF APPEALS' DECISION

The Court of Appeals felt that it was bound by the factual finding of the court below [3] that Amendment 46 was adopted for the purpose of benefiting the MM&P union. Its subsequent review was, therefore, substantially constricted. Like the District Court, it concluded that Amendment 42 was proper and lawful, and concluded that Amendment 46, on its face, did not violate ERISA. In response to the Plan's argument based on *UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982), the Court of Appeals concluded that despite the clear mandate of the collective bargaining agreement, its finding that the amendment was not unlawful *per se*, and this Court's holding in *Robinson*, the district court could find that the primary purpose of the amendment was to protect the union, and therefore the trustees had not acted solely in the interest of the participants. Since it felt it was bound by that conclusion of the trial court, the Court of Appeals affirmed the decision of the District court.

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[3] As discussed below, that finding proceeds from an erroneous legal premise. Accordingly, the Court of Appeals should not have deferred to it. And, since both courts spoke in terms of "discrimination" between covered and non-covered employment, the apparent failure to appreciate that pensioners could *not* return to covered employment so that Amendment 46 was an effort to equalize treatment, may have tipped the balance. Indeed, the perception that application of the Amendment unfairly discriminates appears to be the reason for the district court inquiry into motivation in the first place. (App. p. 30a).

REASONS FOR GRANTING THE WRIT

A. The Eleventh Circuit's decision that the district court could review the "purpose" and "reasonableness" of an otherwise lawful pension plan provision, required by the terms of the collective bargaining agreement, is inconsistent with applicable decisions of the Supreme Court, and directly conflicts with decisions of other Courts of Appeal on an important question of federal law which has not been, but should be, decided by the Supreme Court.

This case raises important issues concerning the proper scope of review of trustee actions taken pursuant to the reasonable and rational requirements of the collective bargaining agreement. The decision of the courts below will result in an increase in federal court litigation over the "reasonableness" of plan amendments required by collective bargaining agreements. Despite the clear holding of this Court in *UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982), the trial court specifically and pointedly engaged in second-guessing of trustees who adopted an otherwise lawful plan provision reasonably and rationally required by the express terms of the collective bargaining agreement. The decision patently conflicts with *United Mineworkers of America v. Helen Mining Co.*, 762 F.2d 1155 (3rd Cir. 1985); *Short v. United Mineworkers of America 1950 Pension Trust*, 728 F.2d 528 (D.C. Cir. 1984); and *Central Tool Company v. IAM National Pension Fund, Benefit Plan A*, 811 F.2d 651 (D.C. Cir. 1987).[4]

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[4] Another case, involving this Plan, *Chambless v. MM&P Pension Plan*, 772 F.2d 1032 (2d Cir. 1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 1189, 89 L.Ed.2d 304 (1986) was cited by the Eleventh Circuit. It involved a different plan provision, and, to the extent it raised collective bargaining issues, such related to the calculation of the *amount* of benefit, based on pre-retirement earnings history, rather than the period of suspension for post-retirement employment. The amount of benefit was not an issue in *Deak*. Thus the *Robinson* issues were substantially different in *Chambless*. More-

The Court of Appeals limited *Robinson* by holding that only those provisions which are "lawful" were shielded from review for "reasonableness". To the extent that any such limitation can be inferred from or be consistent with this Court's decision in *Robinson*, the illegality must be *structural*, that is, inconsistent with some specific statutory requirement or prohibition. *Central Tool*, *supra*, at pp. 662-664, fn. 77. Both the District Court and Court of Appeals found the Plan provisions to be structurally lawful.[5]

The Court of Appeals declined to follow *Robinson*, because it accepted the District Court's finding of an improper purpose. As a result, it found the collective bargaining agreement unlawful, thereby justifying the departure from *Robinson*. By such circular reasoning, the Eleventh Circuit has created an exception which has swallowed the rule. Any plan provision can be examined for "reasonableness", and if it appears to the court to be "unreasonable" that finding effectively sanctifies the otherwise unwarranted inquiry into the purpose of the provision required by the collective bargaining agreement. That same argument was considered, but rejected, in *Central Tool Company, United Mineworkers v. Helen Mining*, and *Short v. Mineworkers Pension Trust.*

The Court of Appeals decision places pension fund trustees in the position of having to determine whether

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over, it does not appear that *Robinson* was raised by either Chambless or the Plan in their respective petition or cross-petition for certiorari.

[5] Certainly, plan trustees need not adopt or incorporate directions from a collective bargaining agreement that plainly violate federal law. A provision requiring 20 years of service prior to vesting, for example, or one which prescribes lower benefit levels based on race or sex, should be ignored by trustees. A different question is presented, however, when the collective bargaining agreement does not violate any federal law. In such a case, there is no basis for trustees to independently question the motives of the parties to collective bargaining.

proposed amendments, required by the provisions of the collective bargaining agreement establishing the trust, and which comply with the structural requirements of ERISA, are improper because they benefit one or more parties to collective bargaining. Trustees are required to carry out their duties "in accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104(a)(1)(D). The Court of Appeals decision, by permitting inquiry into the motives of trustee action required by the collective bargaining agreement, implicitly requires trustees to examine the motives of the parties to collective bargaining.

The trustees are thus squarely on the horns of a dilemma. If they refuse to adopt plan amendments required by the collective bargaining agreement, they are subject to challenge for failing to act "in accordance with the documents and instruments governing the plan." If they adopt the provision, they are subject to challenge for acting in the interest of the party who pushed for the contract language. Such result plainly undermines this Court's decision in *Robinson*, and directly conflicts with *Central Tool Company, United Mineworkers v. Helen Mining*, and *Short v. Mineworkers Pension Trust.*

Under this Court's decision in *Robinson*, the requirement of the collective bargaining agreement to preclude reemployment of pensioners, which the Court of Appeals implicitly found directed the trustees to do what they did, should have insulated that action from any further inquiry as to the motivation or purpose in adopting that amendment. Unless corrected, the decisions below will encourage more litigation seeking to challenge trustee action required by collective bargaining.

Accordingly, this Court should review the decision of the Eleventh Circuit and, upon review, reverse that decision.

B. The Eleventh Circuit's Decision permits a District Court to consider the "reasonableness" or purpose of a pension plan provision lawful on its face, and required by the clear terms of the collective bargaining agreement.

The Court of Appeals found the collective bargaining agreement applicable to the MM&P PENSION PLAN to be clear and positive, requiring

> "Pensioners will be prohibited from working at any job in the maritime industry after a pension is awarded."

The Court of Appeals found that adoption of Amendment 46 complied with that provision. However, it felt bound by the conclusion of the trial court that the trustees, in complying with that provision, were seeking to benefit the union, and by extension, that the requirement was unlawful. The District Court speculated on the alternative kinds of amendment the trustees *could* have adopted. In effect, the court took upon itself the task of deciding what kind of rule the Plan *should* have adopted. Such review was expressly precluded by this Court in *UMWA Health & Benefit Funds v. Robinson, supra.* See also, *United Mineworkers of America v. Helen Mining, supra,* at 1160.

In *Robinson,* this Court held that the provisions of Section 302(c)(5) of the Labor Management Relations Act of 1947, 29 U.S.C. § 186, do not authorize federal courts to review for reasonableness the provisions of the collective bargaining agreement[6] allocating health benefits among potential beneficiaries in an employee benefit trust fund. This Court held that the "sole and exclusive benefit" language of § 302 could not be stretched to justify a "reasonableness" review by the District Court of the terms and provisions of a collective bargaining agree-

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[6] Or plan regulations required by the collective bargaining agreement.

ment establishing or requiring certain benefit conditions. We respectfully suggest that in the instant case the District Court has effectively accomplished the same improper result by an erroneous construction of similar language in § 404 of ERISA, 29 U.S.C. § 1104.

The trial court specifically found that the Plan provisions were not, themselves, unlawful, and the Court of Appeals agreed.

> "We do not hold, however, that in all circumstances a provision similar to, or even identical with, Amendment 46 would violate ERISA. If the Trustees of a plan demonstrate that a provision is rationally related to the financial integrity of the Plan and is adopted absent from or insulated from any conflict of interest, consistent with fiduciary duties, ERISA's protection of participants and beneficiaries could be satisfied." (App. pp. 16a-17a)

Plainly, the Court of Appeals felt that it was appropriate to review the motivation of the trustees in adopting a structurally lawful[7] Plan amendment. As the above-quoted language makes clear, the Court placed the burden of proof on the trustees to establish the *absence* of improper motives. Such was plainly inconsistent with the deference due the trustees of an employee welfare benefit

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[7] Although it felt constrained by the District Court finding, the Eleventh Circuit appears to have found a "rational relationship" between the provision to the purpose of the Plan (App., p. 5a, 9a). The district court ". . . closely examined the evidence to discover the true motivation of the trustees in adopting Amendment 46 rather than merely examining whether the reason given at trial could have been rationally related to legitimate concerns for the beneficiaries." (App., p. 9a). The District Court focused on "union benefit" and did not consider the "rational relationship" standard, except as to the narrow issue of "financial integrity." Under *Robinson*, any such review would appear to be foreclosed, 455 U.S. at 572, 574, so that argument over the appropriate standard is irrelevant. See *Central Tool, supra*, at 656-664.

plan, the product of collective bargaining, the provisions of ERISA, and this Court's holding in *Robinson*.

C. The Eleventh Circuit's decision encourages district courts to speculate on the "purpose" of plan amendments required by collective bargaining agreements; it improperly places the burden on trustees to prove their actions were fair and reasonable.

In concluding the Plan amendment was adopted for an unlawful purpose, the District Court grounded its decision essentially on the fact that the trustees did not seek an actuarial determination of the need for, or the effect of, the Plan amendment, and that it was originally drafted by counsel designated by the union trustees. By focusing on "financial integrity", the courts below have created a presumption that *any* plan amendment must be actuarily required and supported.[8] Any change not so supported is rendered suspect and subject to attack.

The courts failed to appreciate that the reason for the adoption of the Amendment was unrelated to any specific actuarial need, and no useful purpose would have been served by requiring or obtaining an actuarial opinion. The trustees adopted the amendment because it was required to fill a gap between the collective bargaining agreement establishing the Plan and existing regulations, and was consistent with the overall purpose of providing retirement benefits to those who removed themselves from employment in the maritime industry. Since, as noted earlier, pensioners could not freely return to *covered* employment, failure to adopt this rule both failed to comply with the "clear and positive requirement" of the collective bargaining agreement, and discriminated *in favor of* pensioners who returned to non-covered employment. If the Amendment had simply applied to "any

[8] Such leads to the illogical conclusion that trustees may not amend the plan, even when directed by the collective bargaining agreement establishing the plan, except where the reason for the amendment is because of, and supported by, actuarial need.

employment as a licensed deck officer" on U.S. flag vessels, it would have had *exactly* the same effect, but without the "appearance" of discrimination.

Although the trustees conceded that an actuarial study might show the precise magnitude of employer withdrawal, they did so in response to the district court reliance on the absence of such finding as evidence of improper purpose, while emphasizing their concern over the possible effect of *any* withdrawal. In view of their experience in the industry, the trustees were certain that it *would* have an impact. That they believed there would *be* an impact was more important to them than trying to quantify the precise amount of that impact, a point the Eleventh Circuit fails to mention.

Equally significant, it is plain that the District Court substituted its own judgment for that of the trustees by postulating what the trustees might have done. The Eleventh Circuit affirmance will permit, even encourage, courts to speculate concerning "less drastic provisions", "less restrictive suspension mechanism", and other euphemisms to justify overturning plan provisions which strike the court as unfair or "punitive." [9]

The district court "example" (App. p. 32a, fn. 9) is itself a different form of discrimination. It is no less "punitive", having only a different "trigger". The penalty would be the same. Deference to the trial court properly exercising its discretion is one thing; correcting a judge who has intruded into the area reserved for trustee discretion is another. It is critically important

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[9] In order to carry out the requirement of the collective bargaining agreement—to "prohibit" pensioners from returning to employment in the industry—the rule had to be harsh. The trustees had no other way to "prohibit" such employment. The rule was intended to be a deterrent to discourage post-retirement employment in the industry. Since the consequences of violation of the rule were well known, it is inaccurate to refer to the rule as "punitive", which implies malice or bad faith. The district court expressly declined to find any willful intent. App. p. 34a.

that neither court found the provision unlawful *per se*; they simply felt a different rule (which they perceived to be fairer, less restrictive or non-punitive) might have been better. That judgment is for the trustees, not the court.

Much of the district court's analysis reflects a basic misunderstanding of the operation of the Pension Plan, the interplay of the Plan Regulations, the impact of the collective bargaining agreement, the nature of the maritime industry, and perhaps most significantly, the impact of changes in Plan rules on participant behavior. The Eleventh Circuit opinion reflects some of the same confusion.[10]

This case is not just about pension benefits for a handful of pensioners whose benefits were suspended because of their willful violation of Plan rules. Of that handful, even fewer actually would get relief under the district court's "fairer" rule. This case is really about whether trustees, familiar with the Plan and the industry, and directed by the clear and positive command of the collective bargaining agreement, may adopt lawful amendments free of second-guessing as to the "fairness" or "reasonableness" of their action.

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[10] The Eleventh Circuit observation that the trustees acted for the "sole benefit" of the union (App. p. 16a) overstates the District Court's opinion. As the Court of Appeals observed elsewhere in the opinion, the trial court found the trustees acted "primarily to protect" the union by discouraging members who were eligible for their pension from working through another union. The District Court misunderstood the effect of the rule: Members did not get pensions until they retired from *all* maritime employment. At that point, the significant status was plan participation, rather than union membership. The rule was directed at retirees who became re-employed. The purpose of the rule was *not* to encourage retirement. It was to encourage those who did retire to *stay* retired. A pensioner who retired and then returned to non-union employment had no direct impact on union membership rolls. The majority of non-contributing employers were *not* connected with another union. They were primarily non-union operators.

Where the plan provision is required by the collective bargaining agreement, trustees, not judges, should make these choices. Permitting judicial review of these kinds of decisions will only encourage creative advocates to offer endless alternatives, fueled by hindsight and claims of "unfairness", in hopes of attracting judicial sympathy to overturn the product of collective bargaining.

D. The Eleventh Circuit's Decision requires the trustees to prove that they were not motivated by the command of the collective bargaining agreement; the result will encourage frivolous attacks on trustee decisions.

In affirming the decision of the trial court, the Eleventh Circuit specifically held that the Plan provisions were not *per se* lawful, and spoke approvingly of the trustee justifications and explanations for the Plan amendments. Nonetheless, the Court improperly placed the burden on the trustees to prove their "virtue". Under the circumstances of this case, such is an impossible task, and would encourage frivolous challenges to trustee action.

Both courts acknowledged that many actions taken by trustees have the incidental effect of benefiting the union, or the companies supporting the Plan, or both. ERISA clearly contemplates the potential "dual role" of trustees who may also participate in, or be affected by, collective bargaining. 29 U.S.C. § 1108(c)(3). In the adoption of a plan provision required by a collective bargaining agreement, that likelihood is substantially greater. Indeed, it is hard to imagine a Plan provision required by a collective bargaining agreement that does not benefit one or both of the parties to the collective bargaining agreement.[11] Nonetheless, the district court has tortured

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[11] If neither party felt such a provision contained some "benefit" to its parochial interest, it would not likely be negotiated into the collective bargaining agreement in the first place.

the "exclusive benefit" language of ERISA to require trustees to prove that any such benefit to the union, or to the employers, is incidental, and not in any way a motivating factor.

Requiring trustees to prove that a plan amendment required by the collective bargaining agreement benefits neither the union nor the companies is an impossible burden, and would plainly encourage challenges to Plan regulations. Indeed, trustees could be challenged whichever way they decide. If they adopt the rule, unhappy participants could claim the trustees are acting to further the union or company, rather than for the sole benefit of participants. ERISA § 404(a)(1)(A). If they do not adopt the rule, the parties to the contract could argue the trustees are not acting in accordance with the documents governing the plan. ERISA § 404(a)(1)(D).

In *Robinson*, the plan amendment could just as easily have been challenged on grounds that it was adopted to aid the employers as that it was arbitrary and capricious in the abstract. In *Robinson*, the record reflected that the provision was placed in the collective bargaining agreement, because "the Industry" felt that it was to their benefit, and insisted on it to the point of a strike. In the instant case, we are confronted with a similar proposition. Unless the decision of the Eleventh Circuit is reversed and corrected, the decision of this Court in *Robinson* will be quickly and thoroughly eroded.

Attacks on plan provisions required by collective bargaining agreements will not be cast in terms of "arbitrariness", but rather in terms of "union benefit" or "employer protection". The result would be the same. Where a plan provision is required by the collective bargaining agreement, and lawful on its face, the trustees should not have to explain or justify their action. Rather, the challenger should be required to demonstrate that the plan provision is unlawful, based on a structural

violation of ERISA, or some other applicable law or regulation. To permit an otherwise lawful amendment to be stricken because of an alleged "improper purpose" [12], where that purpose is embodied in the collective bargaining agreement, undermines the entire fabric of collective bargaining, and is inconsistent with this Court's prior holding in *Robinson*.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari be issued to review the judgment of the Court of Appeals for the Eleventh Circuit in this case.

Respectfully submitted,

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[12] Or, even worse, an "innocuous divided loyalty" (App. p. 34a).

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 84-3651

WILLIAM F. DEAK, *et al.*,
Plaintiffs-Appellees,
Cross-Appellants,

v.

MASTERS, MATES AND PILOTS PENSION PLAN, *et al.*,
Defendant-Appellants,
Cross-Appellees.

July 15, 1987

Appeals from the United States District Court
for the Middle District of Florida

Before HILL, Circuit Judge, HENDERSON* and BROWN,** Senior Circuit Judges.

JOHN R. BROWN, Senior Judge:

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* *See* Rule 3(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable John R. Brown, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

Introduction

Captain Deak brought this class action on behalf of 2,000 participants in the Masters, Mates and Pilots Pension Plan (Plan) under the Employee Retirement Income Security Act of 1974 (ERISA). 29 U.S.C. §§ 1001-1461. The District Court determined that the Trustees adopted Amendment 46 for the primary purpose of benefitting the MM & P Union and therefore breached their fiduciary duty under ERISA to act in the sole and exclusive interest of the participants and beneficiaries of the Plan.

The central issue on this appeal is whether the Trustees' actions were arbitrary and capricious in amending the Plan so that the length of time retirement benefits are suspended when a retiree becomes re-employed depends on whether the re-employment is with a contributing or non-contributing employer.

We affirm the District Court's holding that Amendment 46 violates ERISA because its discriminatory effect is arbitrary and capricious and the Trustees breached their fiduciary duty of loyalty to the Plan beneficiaries when they adopted the amendment.

The Trustees' Actions

The MM & P Pension Plan originally suspended retirement benefits for the period of re-employment plus six months.[1] In December 1975, in apparent anticipation of

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[1] The pre-1976 Retirement Defined rule in Article II-A, Section 13, of the Plan stated:

a. To be considered retired, a person must withdraw completely from any further employment in any capacity in the maritime industry . . .

b. If a Pensioner works in employment forbidden by this section,

1. He shall not be entitled to pension benefits for any month of such employment and for six additional months.

the provisions of ERISA due to become effective on January 1, 1976, the Trustees adopted several amendments to the Plan.

Amendment 42,[2] which is not contested in this appeal, changed the terminology in the Plan to prevent confusion with the new terminology used in ERISA. It changed the terminology in the Plan from "Normal Pension" to "Regular Pension" and added a definition for "Normal Retirement Age" which is identical to the definition used in ERISA. Amendment 46[3] revised the "Retirement Defined Rule" regarding the suspension of pension benefits during periods of re-employment. Following this amendment, pension benefits of retirees who become re-employed with noncontributing employers[4] are suspended

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2. Following Amendment 42, the Retirement Defined Rule states in pertinent part:

> [*Article I,*] *Section 13.* 'Normal Retirement Age' shall mean the age of 65, or, if later, the age of the Participant on the tenth anniversary of his participation.
>
> * * * * * *
>
> All references in the Rules and Regulations to 'Normal Pension' shall be changed to read 'Regular Pension.'

[3] Amendment 46 modified subparagraph b of Section 13, Article II-A, of the Plan to read:

> b. If a Pensioner works in employment forbidden by that Section,
>
> 1. He shall not be entitled to pension benefits for any month of such employment and for six additional months, provided that the additional six month period shall not extend beyond his Normal Retirement Age, as defined in Article I, Section 13; provided further however, that if such employment is in the capacity of a Licensed Deck Officer on a U.S. flag ocean going vessel employed by a company which is not a participant in the M.M. & P. Pension Plan . . . then the Pension shall not be entitled to pension benefits for any months prior to such Pensioner reaching his Normal Retirement Age, as defined in Article I, Section 13.

[4] A contributing employer was one who hired members of the MM & P Union and thus contributed to the MM & P Pension Plan on their behalf.

for a longer period of time than those of retirees who become re-employed with contributing employers.[5] Prior to Amendment 46, retirees who accepted re-employment within the industry all had their pensions suspended for the same length of time regardless of whether their re-employment was with a contributing or non-contributing

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[5] ERISA prohibits the forfeiture of vested benefit payments but expressly permits Trustees to suspend vested benefit payments during periods of re-employment so long as the suspension does not affect the retiree's entitlement to normal retirement benefits upon attaining normal retirement age. ERISA § 203(a)(3)(B), 29 U.S.C. § 1053(a)(3)(B); *Fine v. Semet*, 699 F.2d 1091, 1093 (11th Cir. 1983). *See also Chambless v. Masters, Mates & Pilots Pension Plan*, 772 F.2d 1032, 1041 (2d Cir. 1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 1189, 89 L.Ed.2d 304 (1986) (interpreting a similar amendment to the MM & P Pension Plan).

Captain Deak contends that he had already attained normal retirement age under the previous benefit plan and, therefore, this suspension violated 29 U.S.C. § 1053(a)(3)(B) as interpreted by 29 C.F.R. § 2530.203-3(a). This argument fails because it misinterprets the phrase "Normal Retirement Age" as it is used in the Code of Federal Regulations.

Prior to 1976, the MM & P Pension Plan provided for normal retirement upon the completion of twenty years of service with the Union. It was not until 1976 that ERISA incorporated normal retirement age as a term of art. In light of the use of normal retirement age in ERISA, the MM & P Pension Plan was amended to eliminate any confusion between the use of "Normal Retirement Age" under ERISA and "Normal Retirement Age" under the Plan. *See* Amendment 42, *supra*, n. 2. Normal retirement age as defined by the MM & P Pension Plan is the later of age 65 or the tenth anniversary of employment. Therefore, a suspension of benefits due to re-employment does not itself violate ERISA. Captain Deak claims in his cross-appeals that he had reached normal retirement age by serving twenty years. The earlier Plan's provision for retirement with full pay after twenty years of service merely provides for vesting of the pension. Captain Deak's pension was fully vested and cannot be reduced, but it can be suspended. *See Johnson v. Franco*, 727 F.2d 442, 445 (5th Cir. 1984); *Fine v. Semet*, 699 F.2d 1091, 1093 (11th Cir. 1983); *Hernandez v. Southern Nevada Culinary and Bartenders Pension Trust*, 662 F.2d 617, 619-20 (9th Cir. 1981).

employer. Thus, the effect of Amendment 46 is to suspend benefits longer if a retiree accepts employment with a company who does not have a collective bargaining agreement with the MM & P Union.

Captain Deak contends that the Trustees enacted Amendment 46 for the sole purpose of benefitting the Union and thereby violated their fiduciary duties under ERISA. The Trustees, on the other hand, argued before both this Court and the District Court that the primary purpose of Amendment 46 was to enhance the financial integrity of the Plan. According to the Trustees, the enhanced suspension for re-employment with non-contributing employers would induce steamship companies who hire non-MM & P employees, or non-Union employees to participate in the Plan in order to gain access to experienced licensed deck officers. Without this Amendment, the Trustees contend that there would be no incentive to use MM & P personnel. With no incentive to hire MM & P personnel, the steamship companies would hire non-MM & P employees and would stop contributing to the Plan. With no contributions, the Plan would be unfunded and unable to pay pensions that are already accrued and owed.

The District Court heard conflicting evidence on the Trustees' reasons behind Amendment 46. Despite the Trustees' compelling contentions, the District Court concluded that the amendment was for the primary benefit of the MM & P Union and not the Plan's participants and beneficiaries:

> At trial and throughout their brief, the Defendants attempted to portray Amendment No. 46 as a rational and even necessary measure designed to protect the financial integrity of the Plan from the adverse consequences of certain developments in the maritime industry and the weakening financial status of some contributing employers. . . . [The Trustees argued that b]ecause the employment of

> other than MM & P Pension Plan personnel on [new, technologically advanced] ships would result in a loss of contributions to the Plan, Amendment No. 46 was adopted to encourage new owners and employers to seek MM & P Pension Plan personnel. The amendment would supposedly attract the new employers to MM & P Pension Plan members by discouraging the most experienced pensioners from seeking employment with non-contributing employers through the mechanism of a harsher penalty for employment with non-contributory employers than for employment with contributing ones. . . . *The Defendants' after-the-fact explanations offered at trial concerning their motivations for the adoption of Amendment No. 46 simply do not mesh with the bulk of the evidence and inferences indicative of their intentions at the time of actual passage.*

Deak v. MM & P Pension Plan, No. 84-3651, unpublished slip op. at 15-16 (M.D. Fla. June 5, 1985) (emphasis added).

The District Court's fact finding that the Trustees enacted Amendment 46 for the primary purpose of benefitting the MM & P Union is a plausible factual conclusion with sufficient support in the record and is thus not clearly erroneous.[6] We therefore proceed in our analysis bound by the District Court's finding of fact that the Trustees adopted Amendment 46 for the primary benefit of the union and not the Plan beneficiaries.

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[6] If the District Court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous.

Anderson v. Bessemer City, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 1512, 84 L.Ed. 518, 528 (1985).

Standard of Review

The standard of review to be employed by district courts when reviewing trustees' actions under ERISA was clearly established in this Circuit in *Sharron v. Amalgamated Insurance Agency Services*, 704 F.2d 562 (11th Cir.1983). "[T]he Trustees in the Administration of the Pension Plan must be sustained as a matter of law unless plaintiff can prove such activities have been arbitrary or capricious." *Sharron* at 564, quoting *Bayles v. Central States, Southeast and Southwest Areas Pension Fund*, 602 F.2d 97, 99 (5th Cir.1979).[7]

The Supreme Court mandated that trustees have full authority with respect to coverage and eligibility requirements and that a court's role is limited to determining whether the trustees abused their broad discretion by adopting arbitrary and capricious standards. *U.M.W. v. Robinson*, 455 U.S. 652, 102 S.Ct. 1126, 71 L.Ed.2d 419 (1982).[8] The District Court should restrict its examina-

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[7] The Eleventh Circuit, sitting en banc, adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981. *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

[8] The Trustees rely on Robinson for the proposition that courts should not interfere with action taken by Trustees pursuant to a collective bargaining agreement. The Trustees correctly argue that ERISA requires them to act "in accordance with the documents and instruments governing the Plan" and that they are prohibited from ignoring an unambiguous command of a collective bargaining agreement policy that is consistent with the purpose of the retirement fund. They, therefore, conclude that Amendment 46 "may not be invalidated simply because the court feels that it is "arbitrary and capricious," where it is consistent with, and indeed mandated by, the product of collective bargaining." Brief for Appellant at 33.

The collective bargaining agreement of the MM & P is clear and positive. It requires that "Pensioners will be prohibited from working at any job in the maritime industry after a pension is awarded." Sec. XXIX-C. Par. 8.

[Continued]

tion to finding whether a rational relationship exists between the Trustees' actions and the Plan's purpose.[9] This Court, under *Anderson v. Bessemer City*, should not review for reasonableness, nor should it substitute its view of a rational relationship for that of the District Court, rather, we must examine the District Court's factual findings for plausibility in light of the evidence presented.

Representatives for the Plan contend that the District Court applied an incorrect standard in reviewing the disparate treatment between re-employment with contributing and non-contributing employers. The District Court stated that "[w]hile these justifications may appear reasonable at first glance, they do not withstand the careful scrutiny with which they must be analyzed." *Deak*, unpublished slip op. at 16 (footnote omitted).

The District Court's opinion clearly reflects that it did apply the correct standard of arbitrary and capricious

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[8] [Continued]

The subsection of ERISA relied on by the Trustees states "a fiduciary shall discharge his duties with respect to a Plan solely in the interest of the participants and beneficiaries and . . . in accordance with the documents and instruments governing the Plan *insofar as such documents and instruments are consistent with the provisions of this title or Title IV*." 29 U.S.C. § 1104(a)(1)(D) (emphasis added).

The Trustees are unable to surmount federal law with a private agreement. Trustees are prohibited from complying with any provision of a collective bargaining agreement which violates the provisions of ERISA prohibiting arbitrary and capricious payment of retirement benefits and impose fiduciary duties on the Trustees.

[9] In *UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562, 570, 102 S.Ct. 1226, 1231, 71 L.Ed.2d 419, 427 (1982), the Supreme Court reversed the Court of Appeals decision which introduced a reasonableness standard when reviewing a benefit trust fund under § 302(c)(5). The Court held that the statute requires the Trustees to maintain the fund for the sole and exclusive benefit of the employees to the exclusion of all others and their conduct is not reviewable for reasonableness. It only requires a rational relationship to the purpose of solely benefitting the employees.

conduct. The "careful scrutiny" language merely indicates that the trial court was not persuaded by the Trustees' "after-the-fact" explanations and that it closely examined the evidence to discover the true motivation of the Trustees in adopting Amendment 46 rather than merely examining whether the reasons given at trial could have been rationally related to legitimate concerns for the beneficiaries. We cannot overemphasis the importance of the District Court's finding of fact that the Trustee's contention that Amendment 46 was adopted solely to strengthen the Plan's financial integrity was an after-the-fact explanation. No matter how reasonable or rational the explanation may appear at this point in time, the District Court found that it was simply not the reason for the Trustees adopting Amendment 46.

Arbitrary and Capricious Conduct

The conditions imposed by Amendment 46 violate federal law in two ways: (i) they are arbitrary and capricious in both their effect on the class of beneficiaries represented by Captain Deak and the manner in which they were adopted; and (ii) they represent a breach of fiduciary duties because they were not enacted for the sole benefit of the Plan's beneficiaries.

In *Elser v. I.A.M. Pension Fund*, 684 F.2d 648 (9th Cir.1982), *cert. denied*, 464 U.S 813, 104 SCt. 67, 78 L.Ed.2d 82 (1983), suspension provisions that deprived employees of past service credits were found arbitrary and capricious "because they discriminated among participants and because they were not actuarially justified." *Id.* at 657. Elser required the Trstuees to show some rational nexus between the funds purpose and its discriminatory eligibility requirement. *Id.* at 656, quoting *Roark v. Lewis*, 401 F.2d 425, 429 (D.C.Cir.1968).

> [B]ecause finite contribution must be allocated among potential beneficiaries, inevitably financial

> and actuarial considerations sometimes will provide the only justification for an eligibility condition that discriminates between different classes of potential applicants for benefits. *As long as such conditions do not violate federal law or policy*, they are entitled to the same respect as any other provision in a collective bargaining agreement.

Robinson at 575, 102 S.Ct. at 1234, 71 L.Ed.2d at 430 (emphasis added).

The Plan attempts to justify the discrimination in Amendment 46 as a rational method of preserving the financial integrity of the Plan and limiting the unfunded liability of the Plan by discouraging non-MM & P employment. Captain Lowen, one of the Plan's Trustees, testified that Amendment 46 would strengthen the Plan's financial stability by replacing older members with new young members, hence reducing the average age of the Plan.[10] Captain Lowen further testified that although lowering the average age was "clearly . . . a part of the assumptions of an actuary," the method in which this was achieved was not presented to the actuaries for independent analysis.

The same argument was made and rejected at the trial court and must similarly be rejected by this court. The trial court found as a matter of fact that "[t]he Defendants' after-the-fact explanations offered at trial concerning their motivations for the adoption of Amendment No. 46 simply do not mesh with the bulk of the evidence and inferences indicative of their intentions at the time of actual passage." *Deak v. MM & P Pension Plan*, No.

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[10] The Union's membership was closed at the time so the only way to the Union could accept new members was to replace old members. The initiation fees of the new members, an amount between $2,000 and $3,800, was paid entirely to the Union. The effect on the Plan of encouraging retirement was to increase retirement benefits currently payable and to decrease the average age of current participants.

84-3651, unpublished slip op. at 16 (M.D.Fla. June 5, 1985).

> Contrary to the Defendants' assertions concerning the actuarial need for a measure like Amendment No. 46, both the Plan Administrator and a Union Trustee testified that although the Plan had some unfunded liability, it was adequately funded and actuarially sound at the time the Amendment was considered. There was, in fact, no reference whatsoever in the minutes of the meetings during which the Amendment was considered to any actuarial studies or projections upon which Amendment No. 46 could have been based. Indeed, while the Plan's actuarial consultants were actively advising the Trustees concerning the financial impact of ERISA and were aiding in the preparation of several other changes in the Plan provisions, they gave no advice concerning the necessity of imposing the harsh and differing penalties for the protection of the Plan's financial integrity.

Id. at 16-17 (Citations to trial transcript and exhibits omitted).

The Trustees of the MM & P Pension Plan failed to demonstrate that adopting the difference periods of suspension provided in Amendment 46 was rationally related to preserving the financial integrity of the Plan. The District Court determined on conflicting evidence that the Trustees enacted Amendment 46 for the purpose of bolstering the Union's stronghold on the supply of masters, mates and pilots and therefore, that the amendment was not rationally related to the financial integrity of the Plan. The Trustees' actions must be analyzed in terms of the actual intent at the time of amending the Plan and cannot be recast on appeal to show a rational nexus could have existed.

Not every aspect of a benefit plan lends itself to actuarial projection and analysis. In those cases, Trus-

tees are expected to call upon their familiarity with benefit plans and their capacity as experienced Trustees to guide their conduct. 29 U.S.C. § 1104(a)(1)(B). The Ninth Circuit recognized that some behavioral predictions are often not subject to verification in *Harm v. Bay Area Pipe Traders Pension Plan Trust Fund*, 701 F.2d 1301, 1306 n.7 (9th Cir.1983). While this tends to bolster the Plan's contention that actuaries were unnecessary to decide that the differing penalties would strengthen the Plan, the Trustees themselves testified that Amendment 46 was focused toward actuarial assumptions. In its brief the Plan stated that to determine the magnitude employer withdrawal would have on the Plan actuarial analysis was necessary. In light of the testimony that the Plan was financially sound at the time, we cannot say the District Court was clearly erroneous by emphasizing the total lack of actuarial analysis in finding any benefit to the Plan was not the true motive for amending the Plan. None of the Trustees' explanations of the purposes behind Amendment 46 justifies the discriminatory affect of distinguishing between re-employment with contributing and non-contributing employers.

The Second Circuit reached the same conclusion in its review of Amendment 47, a similar provision adopted at the same time as Amendment 46. The Second Circuit also rejected the Plan's contention that the purpose of discriminating between re-employment with MM & P employment and non-MM & P employment was motivated to benefit the Plan. *Chambless v. MM & P Pension Plan*, 772 F.2d 1032, 1039 (2d Cir.1985) ("Amendment 47 . . . was not adopted to enhance the financial integrity of the Plan or to benefit the Plan participants and is thus arbitrary and capricious."), *cert. denied*, —— U.S. ——, 106 S.Ct. 1189, 89 L.Ed.2d 304 (1986)

Trustees' Breach of Their Fiduciary Duties

A Trustee is a fiduciary of all participants and beneficiaries of a Plan and is required to "discharge his

duties with respect to a Plan solely in the interest of the participants and beneficiaries and—(A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries." 29 U.S.C. § 1104(a)(1)(A)(i). Despite the restrictive language of section 1104(a)(1)(A)(i), that a trustee act "*solely* in the interest of the participants and beneficiaries," § 1108 explicitly permits a fiduciary to serve as an officer, employee, agent, or other representative of a union or an employer. 29 U.S.C. § 1108(c)(3). This provision allows a trustee to serve as a fiduciary to two principals. The potential of a conflict of interest arising from this role places an onerous burden on the trustee not to violate fiduciary duties to one party while acting for the primary benefit of the other.

> Logic demands that if a fiduciary may hold such positions, then he may fulfill the concomitant responsibilities. . . . Thus, a Trustee of an employee benefit plan does not violate ERISA merely by also serving in a position with an employee organization or employer that requires him to represent such entity in the collective bargaining negotiations that determines the funding of the plan.

Evans v. Bexley, 750 F.2d 1498, 1499 (11th Cir.1985).

In this case however, the District Court held that the MM & P Trustees were not acting as fiduciaries of both parties during negotiations as in *Evans*. Instead the Trustees were using their positions as fiduciaries of the Plan to further goals of the MM & P Union by restricting retirees from accepting further employment with non-participating, and hence non-MM & P Union, companies.[11]

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[11] The Second Circuit identified the same non-beneficiary interests of the company and Union Trustees in analyzing the companion Amendment 47.

> [E]mployer Trustees supported the Amendment to encourage participants to remain working as long as possible for employers who had contributed to the Plan, so that the employers

The Supreme Court addressed this situation in *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 105 S.Ct. 2833, 86 L.Ed.2d 447 (1985). In *Central States*, the Trustees of a multi-employer benefit plan sought to conduct an audit of participating and non-participating employee records to determine whether the companies were making contributions on behalf of all eligible employees The Supreme Court upheld the audit on the grounds that it was made pursuant to a good faith effort to protect the financial integrity of the Plan and was expressly authorized by the collective bargaining agreement. The Court held that "[i]n light of ERISA's standards, Central Transport correctly argue[d] that the audit request would be illegitimate under the standard of loyalty if it were actually an effort by Plan Trustees to expand Plan coverage . . . or to acquire information about the employers to advance union goals." *Id.* 472 U.S. at 571 n.12, 105 S.Ct. at 2840 n.12, 86 L.Ed.2d at 458 n.12. Here, the MM & P Trustees illegitimately advanced Union goals by expanding Union membership and therefore violated their fiduciary duty of loyalty to the plan beneficiaries under ERISA.[12]

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could get their money's worth, whereas the Union Trustees supported the Amendment to attract younger licensed deck officers. Neither the employer nor Union Trustees seemed to support the Amendment to enhance the financial integrity of the Plan itself.

Chambless at 1039.

[12] It is difficult to conceive of a situation where a benefit to the Union would not have incidental benefit to the Plan. If the Union were to obtain a monopoly on masters, mates and pilots, then all employees would have to contribute to the Plan which would, of course, strengthen the Plan. However, the statute requires the Trustees to act for the sole benefit of the Plan beneficiaries. The District Court was entitled to find from the evidence at trial that the actions of the Trustees were for the benefit of the Union. The benefit to the Plan cannot legitimize their motives, especially in light of the findings of fact that the Plan was not underfinanced at the time and that the Trustees made no actuarial investigation of Amendment No. 46.

"[T]he principal statutory duties imposed on the Trustees relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest." *Massachusetts Mutual Life Insurance Company v. Russell*, 473 U.S. 134, 142-143, 105 S.Ct. 3085, 3091, 87 L.Ed.2d 96, 104 (1985).

The Trustees did not breach any duties under ERISA solely by having fiduciary duties to both the Union or employer and the Plan beneficaries. The Trustees can act on behalf of both parties until a situation arises which requires action in the interest of a party other than, and in conflict with the interests of, the plan beneficiaries. Thus, the statutorily imposed fiduciary duty to act solely in the interest of the participants and beneficiaries under ERISA requires trustees who are also officers or agents of a corporation or a union to act with caution in areas of potential conflicts of interest.

The Second Circuit cautioned Trustees of the inherent dangers in maintaining conflicting fiduciary duties in *Donovan v. Bierwirth*, 680 F.2d 263 (2d Cir.1982), *cert. denied*, 459 U.S. 1069, 103, S.Ct. 488, 74 LEd.2d 631 (1982):

> Although officers of a corporation who are Trustees of its pension plan do not violate their duties as Trustees by taking action which, after careful and impartial investigation, they reasonably conclude best to promote the interest of participants and beneficiaries simply because it incidentally benefits the corporation, or, indeed, themselves, their decisions must be made with an eye single to the interest of the participants and beneficiaries. Restatement of Trusts 2d § 170 (1959); II Scott on Trusts § 170, at 1297-99 (1967). . . . [T]his, in turn, imposes the duty on the Trustees to avoid placing themselves in a position where their acts as officers or directors of

> their corporation will prevent their functioning with the complete loyalty to participants demanded of them as Trustees of a pension plan.

Id. at 271.

The MM & P Pension Plan Trustees failed to ensure Amendment 46 would best promote the interest of the participants and beneficiaries. In fact, the District Court determined that they acted for the sole benefit of the union and without the careful and impartial investigation available from the actuaries who were already investigating other aspects of the Plan. The union representatives drafted Amendment 46 and no independent review was sought. The Trustees also failed to examine other less restrictive possible methods to accomplish their stated goal, even though one Trustee testified that less discriminatory and harsh methods could be conceived, they were not considered.[13] The fact that Amendment 46 may also benefit the Plan beneficiaries does not cure the Trustees' failure to act in the interest of the beneficiaries or their failure to protect the beneficiaries against their own conflict of interest.

We do not hold, however, that in all circumstances a provision similar to, or even identical with, Amendment

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[13] In response to a question posed by the court, Captain Lowen testified as follows:

> THE COURT: Well, I was not asking whether an even more restrictive clause might have been fashioned, but whether a lesser one might have been that would have still served the same objects, and if that's true, why the lesser one should not have been the preferred clause in terms of achieving those objects with the least possible effect upon persons in Class 1 in this case?
>
> THE WITNESS: All right. You asked if I could conceive of one?—Yes, I can conceive of one. But we would not—we did not discuss it at that period in time. There was no discussion concerning gradients or median gradients of either restrictions or non-restrictions.

46 would violate ERISA. If the Trustees of a plan demonstrate that a provision is rationally related to the financial integrity of the Plan and is adopted absent from or insulated from any conflicts of interest, consistent with their fiduciary duties, ERISA's protections of the participants and beneficiaries could be satisfied.

We find, as did the Second Circuit in *Chambless* and consistent with the Ninth Circuit in *Elser*, that absent any unfunded liability and actuarial determinations requiring restrictions on re-employment, discriminating among Plan beneficiaries to strengthen the Union was arbitrary and capricious and violated the Trustee's fiduciary duty of loyalty. The testimony supported the District Court's conclusion that the Trustees acted for the primary benefit of the Union in adopting Amendment 46 which arbitrarily and unjustifiably discriminated among the participants of the Plan.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 79-190 Civ-T-H

WILLIAM F. DEAK, *et al.*,
Plaintiffs,

-vs-

MASTERS, MATES AND PILOTS PENSION PLAN, *et al.*,
Defendants.

[Filed June 5, 1984]

MEMORANDUM OPINION

This is an action instituted by the named Plaintiffs for themselves and others similarly situated,[1] ". . . under the provisions of the Employee Retirement Income Security Act of 1974 ('ERISA') (29 USCA Ch. 18) brought to recover benefits due Plaintiff[s] under the terms of the Masters, Mates and Pilots Pension Plan, to enforce [their] rights under the terms of the plan, to obtain relief for and to redress violations of the provisions of ERISA and the terms of the plan, and to obtain such further relief as is appropriate." (Complaint, paragraph 1).

The case proceeded to trial before the Court without a jury on January 17, 18, 19 and 31, 1983. At the con-

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[1] By Order dated February 12, 1981, the case was certified as a class action pursuant to Rule 23(b)(2), F.R. Civ. P.

clusion of the testimony the Court granted the Defendants leave to file a post-trial brief. Due to delays in the preparation of the transcript, that brief was not filed until July 22, 1983. The Plaintiffs filed their response on August 15, 1983. The issues have been fully briefed and the case is now ripe for decision.

The Masters, Mates and Pilots Pension Plan (the Plan) was established many years ago by the International Organization of Masters, Mates and Pilots ancillary to its collective bargaining agreements in the maritime industry with employers of "Licensed Deck Officers," the designated participants in the Plan.

Each of the named Plaintiffs is, by profession, a Master of ocean going vessels. Each possesses a Master's license issued by the Coast Guard permitting the holder to sail in any capacity as a Deck Officer; and, at all times material to the case, each of them was under sixty-five (65) but had more than twenty (20) years of service in the maritime industry, including more than twenty (20) years of credit with the Plan.

Prior to 1976, the Plan provided for four types of pensions available to Plan participants: a Normal Pension for employees who retired with a sufficient number of years of service; a Reduced Pension for employees who retired after age 65 but with less service than required for a normal pension; an Early Retirement Pension for employees who retired between the ages of 60 and 64 after certain specified years of service; and a Disability Pension. (Article II-A, Section 1 of the Plan).

With respect to eligibility for a Normal Pension, the Plan provided in pertinent part as follows (Article II-A, Section 2):

> "*Section 2. Eligibility for a Normal Pension.* An employee shall be entitled to retire on a Normal Pension if he meets the following requirements:

"i. He has pension credits for at least 20 years, regardless of age."

The pre-1976 Plan also contained a so-called "Retirement Defined Rule" which provided in pertinent part as follows (Article II-A, section 13):

"*Section 13. Retirement Defined*

"a. To be considered retired, a person must withdraw completely from any further employment in any capacity in the maritime industry [except under certain circumstances with the permission of the Trustees of the Plan].

"b. If a Pensioner works in employment forbidden by this section,

"1. He shall not be entitled to pension benefits for any month of such employment and for 6 additional months."

On December 29, 1975, the Trustees of the Plan adopted Amendment No. 42 in apparent anticipation of those provisions of ERISA due to become effective on January 1, 1976 (pursuant to 29 USC § 1061(b)(2)). With respect to those provisions of the Plan relevant to this case, Amendment No. 42 did three things. It added a definition of "Normal Retirement Age"; it changed the terminology in the Plan from "Normal Pension" to "Regular Pension"; and it added a new type of pension (known as a Deferred Vested Pension keyed in part to the new definition of Normal Retirement Age). Specifically, Amendment No. 42 provided in pertinent part as follows:

"A. New Sections 13 and 14 shall be added to Article I as follows:

"*Section 13.* 'Normal Retirement Age' shall mean the age of 65, or, if later, the age of the

Participant on the tenth anniversary of his participation.

* * * *

"B. All references in the Rules and Regulations to 'Normal Pension' shall be changed to read 'Regular Pension.'

"C. The last sentence of the first paragraph of Section 1, Article II-A shall read:

"*Five* different types of pensions are established.

"D. A new paragraph e. is added to Section 1, Article II-A as follows:

"e. A Deferred Vested Pension for employees who retire after the age of 60 or their Normal Retirement Age with sufficient years of vesting service.

The definition of Normal Retirement Age added to the Plan by Amendment No. 42 corresponded with the ERISA definition of the same term. The Act provides:

"The term 'normal retirement age' means the earlier of—

"(A) the time a plan participant attains normal retirement age under the plan, or

"(B) the later of—

"(i) the time a plan participant attains age 65, or

"(ii) the 10th anniversary of the time a plan participant commenced participation in the plan."

29 USC § 1002(24).

In August, 1976, the Trustees of the Plan adopted another amendment, Amendment No. 46, which revised the "Retirement Defined Rule." Specifically, Amendment

No. 46 modified subparagraph b of Section 13, Article II-A of the Plan to read, in pertinent part, as follows:

> "b. If a Pensioner works in employment forbidden by that Section,
>
> > "1. He shall not be entitled to pension benefits for any month of such employment and for six additional months, provided that the additional six month period shall not extend beyond his Normal Retirement Age, as defined in Article I, Section 13; provided further however, that if such employment is in the capacity of a Licensed Deck Officer on a U.S. flag ocean going vessel employed by a company which is not a participant in the M. M. & P. Pension Plan . . . then the Pensioner shall not be entitled to pension benefits for any months prior to such Pensioner reaching his Normal Retirement Age, as defined in Artile I, Section 13."

In this instance, the three named Plaintiffs applied in 1977 (Deak and Spence) or 1978 (Fonda) for a Normal (Regular) Pension; and, although each was less than 65 years of age, all three had more than 20 years of credited service and the Trustees of the Plan granted a Normal (Regular) Pension to each of them. Within a short period of time after receiving their pensions, however, each of the named Plaintiffs became employed once again as a master of a vessel; and, upon learning of such employment, the Trustees of the Plan suspended the Plaintiffs' pension payments because of their alleged violations of the "Retirement Defined Rule" as amended by Amendment No. 46. The Plaintiffs then filed this action; and they have previously summarized the heart of their claim as follows:

> "Taken together, Amendments 42 and 46 intertwined 'normal pension,' 'normal retirement age,' and the 'bad-boy/noncompete' clause so that if a pen-

sioner retired after 20-30 years of service, but under age 65, even if the pensioner was reemployed for only one day. Pensioner Plaintiffs have challenged these Amendments and their operation as illegal under ERISA."

By Order on Motions for Summary Judgment dated August 18, 1982, in an effort to define the issues and give direction to the course of the litigation, the Court concluded that the case presented the following legal issues:

1. Did the amendment of the Retirement Defined Rule, Article II-A, Section 13 of the Plan, by Amendment No. 46 in August of 1976, as applied to the Plaintiffs and the members of Plaintiffs' class, violate the minimum vesting standards of ERISA, 29 USC § 1953(a), and particularly § 1953(a)(3)(B)(ii)?

2. Did the amendment of the Retirement Defined Rule, Article II-A, Section 13 of the Plan, by Amendment No. 46 in August of 1976, as applied to the Plaintiffs and the members of the Plaintiffs' class, violate the minimum vesting standards of ERISA, 29 USC § 1053(a), and particularly § 1053(a)(3)(B)(ii), with special reference to the distinction made in Amendment No. 46 between covered and competing employment?

3. Did the amendment of the Retirement Defined Rule, Article II-A, Section 13 of the Plan, by Amendment No. 46 in August of 1976, as applied to the Plaintiffs and the members of the Plaintiffs' class, even if otherwise lawful under ERISA, nevertheless violate the Defendants' fiduciary obligations to the Plaintiffs under ERISA, 29 USC § 1104(a)(1)(A), by virtue of any alleged improper motivation?

A.

As previously noted, Amendment No. 46 provides that a pensioner working in forbidden employment is not en-

titled to pension benefits for any month of such employment and for six additional months, provided that the additional six month period does not extend beyond normal retirement age. The Amendment further states that if the forbidden employment is as a licensed deck officer (LDO) on a United States flag ocean-going vessel operated by a company not participating in the Plan, then the pensioner is not entitled to benefits for *any* month prior to reaching normal retirement age.

The Plaintiffs contend that this Amendment violates Section 203(a) of ERISA, 29 USC § 1053(a). Specifically, the Plaintiffs assert that prior to January 1, 1976 [2] the Plan provided for a "normal" or unreduced pension upon the completion of twenty (20) years of service regardless of age. Therefore, the Plaintiffs reason, since the term "normal retirement age" was never mentioned in the pre-ERISA plan, normal retirement age under the Plan was the age of a participant upon the completion of twenty years of service. Thus, any provision of the Plan which denies pension benefits to those who retire with twenty years of service (here Amendment No. 46), runs afoul of the minimum vesting standards of the statute.

The Defendants, on the other hand, assert that normal retirement age under the Plan is as defined in Amendment No. 42 and 29 USC § 1002(24)(B)—that is, the later of age 65 or the employee's age on the tenth anniversary of his participation in the Plan.[3] Since the possibility of subsequent suspension of benefits pursuant to

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[2] The vesting provisions of ERISA became applicable to these Plaintiffs on January 1, 1976. 29 USC § 1061(b)(2).

[3] The Defendant asserts that, contrary to the Plaintiffs' claims, the definition of normal retirement age in Amendment No. 42 "merely expressly defined that which had been implicit throughout." (Defendant's Post-Trial Brief at 8.) This conclusion is based on the fact that age 65 has long been a component of several types of pensions under the Plan.

Amendment No. 46 is limited to benefits payable before normal retirement age, the Defendants contend, Section 203(a) of ERISA is simply not applicable. Thus, the argument continues, the Trustees of the Plan could suspend these participants' benefits before age 65 without violating ERISA.

Section 203(a), 29 USC § 1053(a), provides in pertinent part:

> Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age . . . .

Section 3(24) of ERISA, 29 USC § 1002(24), states:

> The term "normal retirement age" means the earlier of—
>
> (A) the time a plan participant attains normal retirement age under the plan or
>
> (B) the later of—
>
> (i) the time a plan participant attains age 65, or
>
> (ii) the 10th anniversary of the time a plan participant commenced participation in the plan.

An examination of the plain language of the statute and the provisions of the Plan reveals that the Plaintiffs' contention is without merit. As the Court has previously stated, Amendment No. 42 validly altered certain portions of the Plan in anticipation of the operation of ERISA in January, 1976. Those changes, made before the vesting provisions of the statute became applicable, operated to coordinate the terminology of the Plan with that of ERISA by explicitly defining normal retirement age in

a way suggested by the statute, and by changing the name of the pension from "normal" to "regular".[4]

Similarly, Amendment No. 46 plainly provides that a suspension of benefits may occur in certain circumstances, but that such suspension may not extend beyond normal retirement age as defined in the statute. Therefore, since Section 203(a) requires only that pension rights must be vested and nonforfeitable upon the attainment of the statutory normal retirement age,[5] the new "Retirement Defined Rule" of Amendment No. 46 does not violate ERISA's minimum vesting standards. *See Johnson v. Franco*, Case No. 83-3009 (5th Cir. March 19, 1984) slip op.; *Plumlee v. The International Organization of Masters, Mates and Pilots*, Case No. 82-3455 (9th Cir. June 8, 1983) slip op.; *Harm v. Bay Area Pipe Trades Pension Plan Trust Fund*, 701 F.2d 1301 (9th Cir. 1983), *Hurn v. Retirement Pension Fund*, 648 F.2d 1252 (9th Cir. 1981), *rev'd on other grds*, 703 F.2d 386 (9th Cir. 1983); *Riley v. MEBA Pension Trust*, (*Riley* II), 452 F. Supp. 117 (S.D. N.Y.), *aff'd* 586 F.2d 968 (2d Cir. 1978);[6] *cf. Nichols v. Board of Trustees of the Asbestos Workers Local 24 Pension Plan*, Case No 79-0263 (D. D.C. 1979) memorandum op.

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[4] These alterations did not, however, in any way amend, modify or repeal the Plan provisions governing the pension available after twenty years of service regardless of age. *See* Order of August 18, 1982.

[5] "There is nothing in the legislative history which casts doubt upon such a reading of 203(a). Indeed, other provisions of ERISA recognize that Congress never intended to impose upon a plan a requirement that any benefits be payable before age sixty-five . . . thus it does no violence to the scheme of the Act to permit defendant to withhold benefits from plaintiff until plaintiff reaches age sixty-five." *Riley v. MEBA Pension Trust*, (*Riley* II) 452 F. Supp. 117, 120 (S.D. N.Y. 1978).

[6] The Plaintiffs attempt to distinguish all of these cases by calling *Plumlee, Harm, Turn and Riley* II "early retirement cases" which differ from this case in which the Plaintiffs have reached

B.

Section 203(a)(3)(B) of ERISA, 29 USC § 1053(a)(3)(B) provides:

> A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits—
>
> > (ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

The Plaintiffs further contend, and presented evidence to show, that their subsequent employment was not "in the same industry, in the same trade or craft and the same geographic area covered by the Plan"; and, therefore, the Trustees could not properly suspend their benefits under Section 203(a)(3)(B) of ERISA.

Consideration of this contention is foreclosed, however, by the previous conclusion that the minimum vesting standards of the statute do not apply to this case in the first instance because the Plaintiffs simply have not attained the statutory normal retirement age. *See Riley* (*Riley* II), 452 F. Supp. 117 (S.D. N.Y.), *aff'd*, 586 F.2d 968 (2d Cir. 1978)[7] This conclusion is supported by the

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normal retirement age. This argument, of course, simply begs the issue.

[7] "The arguments in both the district court and here revolved around that question and the issue of whether Riley's government employment as an Assistant Construction Representative was 'in the same industry' and 'in the same trade or craft' as his previous employment by the United States Lines, Inc. ERISA § 203(a)(3)(B)(ii). Neither party paid much attention to technical provisions of the new statute, notably those as to the effective date, *see* 570 F.2d at 410-13. All things considered, we believe that if counsel for MEBA had moved for modification of the mandate to allow the

relevant portion of the Regulations promulgated by the Department of Labor which states:

> This section (Section 203(a)(3)(B)) sets forth the circumstances and conditions under which such benefit payments may be suspended A plan may provide for the suspension of pension ~~benefits which~~ commence prior to the attainment of normal retirement age, or for the suspension of that portion of pension benefits which exceeds the normal retirement benefit, or both, for any reemployment without regard to the provisions of section 203(a)(3)(B) and this regulation to the extent (but only to the extent) that suspension of such benefits does not affect a retiree's entitlement to normal retirement payable after attainment of normal retirement age, or the actuarial equivalent thereof.

29 CFR § 2530.203-3(a).

C.

The Plaintiffs next claim that the Trustees' adoption of Amendment No. 46 violated the fiduciary duty owed by the Trustees to the pensioners. The Plaintiffs specifically contend that the Trustees adopted Amendment No. 46 to protect the Union from loss of membership rather than to solely benefit the Plan participants.

Section 404(a) of ERISA, 29 USC § 1104(a) provides:

> (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and

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district court to consider the claim that § 208(a) does not protect Riley against forfeiture until he reaches normal retirement age, we should and would have granted it." *Riley* II, 586 F.2d at 972.

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter.

Trustees are generally knowledgeable of the details of a trust and are, therefore, in a position to make prudent judgments concerning participant eligibility. Additionally, the trustees bear a responsibility to all potential beneficiaries, and such a duty necessarily results in the drawing of hard boundary lines which inevitably adversely affect some individuals. *See e.g. Ponce v. Construction Laborers Pension Trust for Southern California*, 628 F.2d 537 (9th Cir. 1980); *Rueda v. Seafarers International Union*, 576 F.2d 939 (1st Cir. 1978). Consequently, as the Eleventh Circuit recently stated:

> The actions of the trustees in the administration of the pension plan must be sustained as a matter of law unless plaintiff can prove such activities have been arbitrary or capricious.

Sharron v. Amalgamated Insurance Agency Services, Inc., 704 F.2d 562, 564 (1983). Although there appears to be no established standard for identifying the characteristics of an arbitrary or capricious decision by pension plan trustees, case law does provide some guidance. Thus,

federal courts have invalidated the adoption of forfeiture provisions where the trustees' actions were not based upon actuarial needs, but rather on the trustees' own assumptions and surmises (*See Elser v. I.A.M. National Pension Fund*, 684 F.2d 648 (9th Cir. 1982), *Winpisinger v. Aurora Corp.*, 456 F. Supp. 559 (N.D. Ohio 1978)). Similar results have been reached where the forfeiture provisions were "unduly drastic given the poor fit between the provisions and the goal they [were] designed to achieve," and "far less punitive means [were] available to satisfy the legitimate objectives of fund preservation" (*See Central Tool Company v. International Association of Machinists National Pension Fund*, 523 F. Supp. 812 (D. D.C. 1981)).

A careful analysis of the provision in question and the evidence presented at trial leads me to the conclusion that the Trustees in this instance breached their statutory fiduciary duty in adopting Amendment No. 46. In short, the Trustees drew a distinction between certain types of re-employment in the industry primarily to protect the Masters, Mates and Pilots Union (the Union) by discouraging members who were eligible for their pension from accepting any job which benefitted a competing union.

At trial and throughout their brief, the Defendants attempted to portray Amendment No. 46 as a rational and even necessary measure designed to protect the financial integrity of the Plan from the adverse consequences of certain developments in the maritime industry and the weakening financial status of some contributing employers. Specifically, the Defendants contend that the maritime industry was in a state of flux, owing primarily to the increased use of larger, more expensive and more technologically advanced ships which employed fewer but more highly qualified mates and deck officers. (T-B-138-9, T-B-149-53). Because the employment of other than MMP personnel on these ships would result in a loss

of contributions to the Plan, Amendment No. 46 was adopted to encourage new owners and employers to seek MMP personnel. (T-B-155). The Amendment would supposedly attract the new employers to MMP members by discouraging the most experienced pensioners from seeking employment with non-contributing employers through the mechanism of a harsher penalty for employment with non-contributory employers than for employment with contributing ones.

While these justifications may appear reasonable at first glance, they do not withstand the careful scrutiny with which they must be analyzed.[8] The Defendants' after-the-fact explanations offered at trial concerning their motivations for the adoption of Amendment No. 46 simply do not mesh with the bulk of the evidence and inferences indicative of their intentions at the time of actual passage.

Contrary to the Defendants' assertions concerning the actuarial need for a measure like Amendment No. 46, both the Plan Administrator and a Union Trustee testified that although the Plan had some unfunded liability, it was adequately funded and actuarially sound at the time the Amendment was considered. (T-B-11506, T-C-133). There was, in fact, no reference whatsoever in the minutes of the meetings during which the Amendment was considered to any actuarial studies or projections upon which Amendment No. 46 could have been based. (*See* Plaintiffs' Exhibit No. 10). Indeed, while the Plan's actuarial consultants were actively advising the Trustees concerning the financial impact of ERISA and were aiding in the preparation of several other changes in the Plan provisions (See Defendants Exhibit No. 27), they gave no advice concerning the necessity of imposing the

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[8] "We are not to close our eyes as judges to what we must perceive as men." *People ex rel Alpha Portland Cement Company v. Knapp*, 230 N.Y. 48, 63, 129 N.E. 202, 208 (1920) (Cardozo, J.).

harsh and differing penalties for the protection of the Plan's financial integrity. (T-B-38).

It is also significant that despite the availability of less drastic provisions by which to accomplish the Trustees' avowed intention of inducing new ship owners to become contributors to the Plan (T-C-143-5),[9] there was little discussion among the Trustees concerning any alternatives to the provision. It is equally significant that at the time of the adoption of the Amendment the Union was involved in an ongoing struggle for members with other maritime labor organizations (*E.g.*, T-B-141), and that the text of Amendment No. 46 was originally drafted by Union counsel (T-C-142).

All of this strongly evidences that the Trustees were primarily motivated by a desire to protect the Union through the passage of the Amendment (*see also* T-C-145) and were not acting "for the exclusive purpose of providing benefits to participants and their beneficiaries."

RELIEF

Having concluded that the Trustees breached their statutory fiduciary duty in adopting Amendment No. 46, Section 502(a)(3) of ERISA, 29 USC § 1132(a)(3) authorizes the Court to "enjoin any act or practice which violates any provision of this subchapter or the terms of the plan or . . . to [grant] other appropriate equitable

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[9] There can be little doubt that the Trustees could have fashioned a less restrictive suspension mechanism which would have accomplished their stated objective of attracting the new owners of the larger, more technologically advanced ships to become contributors to the Plan. For instance, a suspension provision which keyed a limited suspension to employment on vessels exceeding a certain size or less than a certain age would protect the financial integrity of the Plan in the face of anticipated developments in the maritime industry while at the same time providing a *non-punitive* measure with regard to suspension of participants' benefits.

relief to redress such violations or to enforce any provisions of this subchapter or the terms of the plan." [10]

In determining what is appropriate relief in this case, I must consider the remedy which is logically dictated for each distinct sub-class previously certified.[11] The three sub-classes are: (1) all persons who are members of the Masters, Mates and Pilots Pension Plan presently receiving benefits who are under the age of 65; (2) all persons who are members of the Masters, Mates and Pilots Pension Plan who have had their benefits suspended as a result of their seeking employment after payment of benefits has commenced; (3) all members of the Masters, Mates and Pilots Pension Plan who have qualified for "Normal" or "Regular" retirement, are under 65 years of age, and have not retired. As to sub-classes (1) and (3), injunctive relief alone provides an appropriate remedy since members of those classes have not experienced any monetary detriment as a result of the adoption and administration of Amendment No. 46. Consequently, as to these sub-classes, the Trustees will be enjoined from enforcing the provisions of Amendment No. 46 to the extent that such amendment purports to justify suspension of plan benefits, due to employment in the maritime industry, for any month occurring more than six (6) months following the cessation of such employment.

The members of sub-class (2), however, have suffered financially as a result of the enforcement of Amendment No. 46. Therefore, the members of sub-class (2) are entitled to have their improperly suspended benefits re-

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[10] "The reports of the various committees . . . make it clear that Congress intended to provide the courts with broad remedies for redressing the interests of participants and beneficiaries when they have been adversely affected by breaches of fiduciary duty." *Eaves v. Penn*, 587 F.2d 453, 462 (10th Cir. 1978).

[11] By Order dated February 12, 1981, three sub-classes were certified pursuant to Rule 23, F. R. Civ. P.

stored; this means that the Plan must immediately pay to each member of sub-class (2) any benefits previously suspended pursuant to Amendment No. 46 and owing at the present date, together with prejudgment interest from the date of each suspension at the rate of 12%,[12] provided further that such benefits would also be owed the Plan participants under the terms of the Retirement Defined Rule[13] which Amendment No. 46 was designed to replace.[14] Further, the Trustes will be enjoined from enforcing the provisions of Amendment No. 46 against the members of sub-class (2) in the future.

The conclusion that the Trustees have breached their fiduciary duty, however, neither requires nor implies a finding that the Trustees acted with any wilful intent to breach their statutory obligation to the Plan beneficiaries, and I now explicitly decline to make such a finding. Rather, the Trustees' adoption of Amendment No. 46 merely manifests an innocuous divided loyalty which happened to produce a result which, in law, constitutes a violation of fiduciary obligations. Therefore, I cannot say that the Trustees' actions in this case were so "mali-

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[12] The Court may consider by analogy the law of the forum state as the proper basis for establishing the rate of prejudgment interest. *Sabine Towing and Transportation Company, Inc. v. Zapata Ugland Drilling, Inc.*, 553 F.2d 489 (5th Cir. 1977). *See Fla. Stat.* § 687.01.

[13] Article II-A, Section 13 of the pre-1976 Plan.

[14] Traditional trust law provides for broad and flexible equitable remedies in cases involving breaches of fiduciary duty. Specifically, that body of law provides that in such instances plan participants should be restored to the position they would have occupied but for the breach of trust; that is, a return to the *status quo ante*. Restatement (Second) of Trusts, § 205, Comment as *cited in Eaves v. Penn, supra*, at 462. In this instance, a return to the *status quo ante* means that determination of the benefits due the members of sub-class (2) must be calculated as they would have been if the pre-Amendment No. 46 Retirement Defined Rule were in effect throughout the period during which benefits were suspended.

cious, flagrant or outrageous," as to justify the imposition of punitive damages. *See e.g. Baeten v. Van Ess*, 474 F. Supp. 1324, 1331 (E.D. Wis 1979) As outlined above, there are adequate means of enforcing the Plaintiffs' rights short of imposing punitive damages.

Similarly, I decline to find the individual Trustees personally liable to these Plaintiffs for the economic consequences flowing from the breach of fiduciary duty which occurred here. This case is not one involving a loss of plan assets, or profits to the fiduciary through the use of plan assets, and is, therefore, not the type of breach for which Congress intended to impose personal liability. *See* 29 USC § 1132(d)(2); 29 USC § 1109; 1974 U.S. Code Cong. & Ad. News 5038, 5100. Imposing the burden of personal liability upon the individual Trustees for such a violation of a very complex statute might deter capable persons from serving as trustees for these plans. *See Fentron Industries v. National Shopmen Pension Fund*, 674 F.2d 1300, 1307 (9th Cir. 1982).

A separate order granting the relief outlined herein will be entered accordingly.

IT IS SO ORDERED.

DONE and ORDERED at Tampa, Florida, this 4th day of June, 1984.

/s/ W. Terrell Hodges
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 79-190 Civ-T-H

WILLIAM F. DEAK, *et al.*,
Plaintiffs,

—vs—

MASTERS, MATES AND PILOTS PENSION PLAN, *et al.*,
Defendants.

[Filed June 5, 1984]

FINAL DECREE

Pursuant to the Court's Memorandum Opinion filed this date it is now

ORDERED, ADJUDGED AND DECREED:

1. That Amendment No. 46 to the Masters, Mates and Pilots Pension Plan (the Plan) is hereby declared to be void and without any force to the extent that such amendment purports to justify the suspension of plan benefits, due to employment in the maritime industry, for any month occurring more than six (6) months following the cessation of such employment;

2. That the Defendants and their agents, employees, attorneys and those persons in active concert and participation with them who receive actual notice of this Decree by personal service or otherwise are hereby permanently restrained and enjoined from enforcing Amendment No. 46 (to the extent described in paragraph 1 above) in order to withhold or suspend benefits from the following classes or sub-classes of Plan participants:

(1) All persons who are members of the Masters, Mates and Pilots Pension Plan presently receiving benefits who are under the age of 65;

(2) All persons who are members of the Masters, Mates and Pilots Pension Plan whose benefits were suspended by the operation of the invalid portion of Amendment No. 46 as a result of their seeking employment after payment of benefits had commenced;

(3) All persons who are members of the Masters, Mates and Pilots Pension Plan who have qualified for "Normal" or "Regular" retirement, are under 65 years of age and have not retired.

3. That, in order that the members of Sub-class (2) may have their improperly suspended benefits restored, the Defendants are directed to file with the Court, within ninety (90) days of the date of this Order, an accounting stating:

(a) The names of all persons within Sub-class (2);

(b) The months during which their benefits were both suspended pursuant to Amendment No. 46 and owed under the terms of the Retirement-Defined Rule which Amendment No. 46 was designed to replace, viz., Article II-A, Section 13 of the pre-1976 Plan;

(c) The amounts now due and owing to each named member of Sub-class (2) under the terms of this Decree and the Court's Memorandum Opinion.

4. That the court retains jurisdiction of the parties and of this cause for the purpose of enforcing this Order and making such further Orders as are necessary.

DONE and ORDERED at Tampa, Florida, this 4th day of June, 1984.

/s/ W. Terrell Hodges
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 79-190 Civ-T-H

WILLIAM F. DEAK, *et al.*,
Plaintiffs,

—vs—

MASTERS, MATES AND PILOTS PENSION PLAN, *et al.*,
Defendants.

[Filed Aug. 20, 1984]

ORDER

This is a class action brought under the Employee Retirement Income Security Act of 1974 (ERISA) to recover benefits due under the terms of the Masters, Mates and Pilots Pension Plan (the Plan), to enforce rights under the Plan and to obtain relief for violations of the provisions of ERISA and the Plan. On June 5, 1984, the Court entered its Memorandum Opinion and Final Decree which, among other things, invalidated Amendment No. 46 to the Plan, restrained enforcement of that Amendment and directed that the Defendants file an accounting with the Court to facilitate an award of appropriate relief.

Now before the Court is the Plaintiffs' motion to alter or amend the judgment. Two distinct grounds are asserted in support of the motion.

The Plaintiffs' first argument is that "the Court overlooked Plaintiffs' contention (i) that the Plan contained

no explicit definition of normal retirement age prior to the adoption of Amendment No. 42, but rather an implicit definition of normal retirement age, (ii) that Plaintiffs had reached their normal retirement age under the Plan and had begun to receive their normal retirement benefit, and (iii) that Plaintiffs are entitled to the right to elect to remain under the Plan's implicit definition of normal retirement age as it existed prior to the adoption of Amendment No. 42 (Plaintiffs' footnotes omitted).*

Essentially, then, the Plaintiffs assert that Amendments No. 42 and 46 operated to reduce previously accrued benefits, thereby entitling each Plan participant with five or more years of service the right to elect to have his nonforfeitable pension computed under the pre-Amendment provisions. *See* 29 USC § 1053(c)(1)(B).

The assumption inherent in the Plaintiffs' assertion is that the suspension of benefits is an alteration in the Plan's vesting schedule just as, for instance, a cancellation of past service credits would be. *See Fentron Industries, Inc. v. National Shopmen Pension Fund*, 674 F.2d 1300 (9th Cir. 1982). And it is this assumption which is the undoing of the Plaintiffs' argument. A withholding of previously vested benefits pursuant to suspensions otherwise lawful under the minimum vesting provisions does not constitute a change in the vesting schedule or an unlawful forfeiture, but merely results in a difference in the payment timetable. *See Hernandez v. Southern Nevada Culinary and Bartenders Pension Trust*, 662 F.2d 617 (9th Cir. 1981); T-D 36-39. Moreover, as has been exhaustively analyzed previously, the statute was clearly designed to protect the vesting of benefits; it was not designed to and does not impose upon plans

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* The Plaintiff also argues that the decisions cited by the Court in Part A of the Memorandum Opinion do not address the issue but "simply assumed away the issue by stating that [the] Plaintiffs had not yet reached normal retirement age."

the requirement that any benefits be *payable* before normal retirement age, in this case age sixty-five, etc. *See Riley v. MEBA Pension Trust*, (Riley II), 452 F.Supp. 117, 120 *aff'd*, 586 F.2d 968 (2d Cir. 1978); 1974 *U.S. Code Congressional and Administrative News* 4639, 5062-63. Therefore, as to this first ground, the Plaintiffs' motion is DENIED.

The Plaintiffs further contend that the Court "overlooked the provisions of ERISA's non-forfeiture requirement set forth in 29 USC 1053(a)(3)(B)(ii) . . . in reinstating the prior Retirement Defined Rule . . ." as a replacement for the now invalidated Amendment No. 46. The Plaintiffs somewhat misperceive the Court's Memorandum Opinion and Final Decree. In those orders the Court did not reinstate the prior Retirement Defined Rule but rather stated, in an effort to fashion relief consistent with the *status quo ante*, that the benefits restored to the members of sub-class (2) should be those which were both improperly suspended and would have been owed to Plaintiffs under the previous Retirement Defined Rule. The Court did not intend, however, to imply that the Trustees could calculate owed benefits in a manner inconsistent with the remainder of the Memorandum Opinion and Final Decree.

Therefore, in order that any ambiguity regarding the Memorondum Opinion and Final Decree be eliminated, that Opinion and that Decree are amended as set forth below. The members of sub-class (2) are entitled to have their improperly suspended benefits restored. This means that the Plan must immediately pay to each member of sub-class (2) any benefits previously suspended pursuant to Amendment No. 46 and owing at the present date, together with prejudgment interest at the rate of 12%, provided that such benefits would also be owed to the Plan participants under the terms of the Retirement Defined Rule which Amendment No. 46 was designed to replace, i.e. Article II-A, Section 13 of the pre-1976

Plan; and provided further that Article II-A, Section 13 of the pre-1976 Plan shall not be construed as allowing suspension of benefits for any month after a participant had reached his normal retirement age if he is not engaged in prohibited re-employment, and only then to the extent allowed by 29 USC § 105(a)(3)(B)(ii).

In all other respects, the previously entered Memorandum Opinion and Final Decree are CONFIRMED and remain in force.

IT IS SO ORDERED.

DONE and ORDERED at Tampa, Florida, this 20th day of August, 1984.

/s/ W. Terrell Hodges
United States District Judge

STATUTORY PROVISIONS

Section 302 of the Labor Management Relations Act of 1947, 28 U.S.C. § 186, provides in pertinent part:

§ 186. Restrictions on financial transactions

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

* * * *

(c) The provisions of this section shall not be applicable

* * * *

(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representa-

tives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; . . .

The Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq., provides in pertinent part as follows:

[Section 3] § 1002. Definitions

For purposes of this subchapter:

* * * *

(2) (A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund or program—

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

* * * *

(19) The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 1053(a)(3) of this title.

* * * *

(24) The term "normal retirement age" means the earlier of—

(A) the time a plan participant attains normal retirement age under the plan, or

(B) the later of—

(i) the time a plan participant attains age 65, or

(ii) the 10th anniversary of the time a plan participant commenced participation in the plan.

[Section 203] § 1053. Minimum vesting standards

(a) Nonforfeitability requirement

Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

* * * *

(3) (B) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits—

(i) in the case of a plan other than a multiemployer plan, by an employer who maintains the plan under which such benefits were being paid; and

(ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph, including regulations with respect to the meaning of the term "employed".

[Section 404] § 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

[Section 408] § 1108. Exemptions from prohibited transactions

* * * *

(c) Fiduciary benefits and compensation not prohibited by section 1106

Nothing in section 1106 of this title shall be construed to prohibit any fiduciary from—

* * * *

(3) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.